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6 IN THE DISTRICT COURT OF GUAM

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8 UNITED STATES OF AMERICA,
9 Plaintiff,
10 vs.
11 NICHOLAS EDWARD TOMASEK, III,
12 Defendant.

CRIMINAL CASE NO. 17-00022

FINDINGS OF FACT AND ORDER

13 This case came before the court on December 13, 2022, for an evidentiary hearing on the
14 allegations contained in the Violation Petition filed on November 16, 2022, and the Second
15 Supplemental Declaration filed on November 23, 2022, *see* ECF Nos. 100 and 105, that the
16 Defendant (1) failed to comply with his substance abuse treatment program when he failed to return
17 to the Lighthouse Recovery Center on November 3, 2022, and (2) tested positive for
18 methamphetamine and amphetamine on November 21, 2022.

19 The government called Valerie Reyes to the stand. Ms. Reyes is the director of the Salvation
20 Army Lighthouse Recovery Center (“LRC”), where she’s worked since 2014. Among her various
21 duties, Ms. Reyes oversees compliance with LRC’s grants with the U.S. Probation Office and the
22 Guam Behavioral Health and Wellness Center, supervises and manages the residential treatment
23 program and operations of the Salvation Army, and provides individual and group counseling
24 sessions as needed. Ms. Reyes testified that on November 2, 2022, the Defendant met with her at
25 about lunch time for a scheduled meeting. This was her initial contact with him, and because it was
26 hot (they met outside under an awning) and he had just come after work, the session only lasted
27 about 30 minutes. During the meeting, the Defendant asked if there was any food available, and
28 Ms. Reyes said she would check at the conclusion of their session. After their meeting ended,

1 Ms. Reyes checked if there was any food available to give the Defendant, but there was none, so she
2 told him to return the following day (November 3, 2022) and she would give him a bag of food and
3 then schedule his next session. Ms. Reyes testified that the Defendant never returned on the
4 following day. She did, however, recall that the Defendant had a session scheduled with her on
5 November 21, 2022, at 9:00 a.m.,¹ so she surmised that he likely called the week after November 3rd
6 to schedule that appointment with her.

7 Based on the testimony presented, the court finds that the government did not meet its burden
8 of proving by a preponderance of the evidence that the Defendant failed to participate in a substance
9 abuse treatment program or failed to follow the rules and regulations of that program as alleged in
10 the violation petition and supporting declaration. As Ms. Reyes stated, the November 2nd meeting
11 was the initial contact between Ms. Reyes and the Defendant, and no schedule of treatment sessions
12 had yet been set on that day because she wanted to take into consideration the Defendant's work
13 schedule and his family obligations. While Ms. Reyes told the Defendant to return on November 3rd
14 when she could give him a bag of food and they could discuss when to schedule their next session,
15 the Defendant's failure to return and obtain the bag of food is not a violation of the substance abuse
16 treatment program's rules and regulations. Additionally, the Defendant eventually called the
17 following week and scheduled his next session with Ms. Reyes for November 21, 2022. The
18 government has not proven by a preponderance of the evidence that the Defendant failed to comply
19 with the substance abuse treatment program.

20 With regard to the second remaining allegation that the Defendant tested positive for
21 methamphetamine and amphetamine on November 21, 2022, defense counsel stated that the
22 Defendant is not contesting the positive test result, but he asserts that the positive result was from
23 the Defendant's admitted drug use on November 17, 2022, not from any other drug use between
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25 ¹ During questioning, Ms. Reyes stated that she recalled that the Defendant spoke with
26 Carina Martinez (staff member at LRC) the morning of November 21, 2022, to confirm his
27 appointment for that morning at 9:00 a.m., and Ms. Reyes told Ms. Martinez that if the Defendant
28 was going to be late, he would have to reschedule the appointment since Ms. Reyes already had an
emergency appointment scheduled for 10:00 a.m. that day. The Defendant's appointment was later
rescheduled to November 28, 2022.

1 November 17th and 21st. Based on the Defendant's own admission, the court finds that the
2 government has met its burden of proving by a preponderance of the evidence that the Defendant
3 tested positive for methamphetamine and amphetamine on November 21, 2022. Whether the
4 positive result on November 21st can relate back to the Defendant's drug use on November 17th is
5 not an issue before the court.

6 The parties are ordered to appear on Tuesday, February 7, 2023, at 9:00 a.m. to present their
7 argument as to an appropriate sanction for the violations admitted by the Defendant and found by
8 the court.

9 IT IS SO ORDERED.



/s/ **Michael J. Bordallo**
U.S. Magistrate Judge
Dated: Jan 31, 2023